LIBRARY
SUPREME COURT U. S.

Office-Supreme Court, U. S.
FILED
OCT 20 1949
CHARLES ELMORE CROPLEY
CLERK

No. 79

In the Supreme Court of the United States

OCTOBER TERM, 1949

JOHN B. MADDEN, AS COLLECTOR OF INTERNAL REVENUE FOR THE FIFTH DISTRICT OF NEW JERSEY, PETITIONER,

v.

ATLANTIC FURNISHING COMPANY, A CORPORATION OF THE STATE OF NEW JERSEY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Specification of errors to be urged	6
Summary of argument	6
Argument:	
A net operating loss sustained in 1943 and carried back to 1941, does not entitle taxpayer to a refund of interest assessed for failure to pay, as and when due, income and excess profits taxes prescribed by law to be returned and paid in 1941	10
A. The respondent's liability for tax was actual and existent on December 15, 1941	13
B. The carry-back provisions of the Internal Revenue Code were not intended to excuse a failure to make timely payment of taxes	14
C. The Congressional understanding is in accord with the Collector's view, not that of the court below	18
D. The respondent's claim is barred on legal and equitable principles alike	28
Conclusion	30
Appendix	31

CITATIONS

Cases:

Billings v. *United States*, 232 U. S. 261	12, 13
Brandtjen & Kluge, Inc. v. *United States*, 78 F. Supp. 509	18
Brewster v. *Gage*, 280 U. S. 327	26
Burnet v. *Guggenheim*, 288 U. S. 80	26
Champ Spring Co. v. *United States*, 47 F. 2d 1, certiorari denied, 283 U. S. 852	30
City of New York v. *Saper*, 336 U. S. 328	14
Commissioner v. *Lamont*, 156 F. 2d 890, certiorari denied, 329 U. S. 782	26
Deputy v. *duPont*, 308 U. S. 488	29
Great Northern Ry. Co. v. *United States*, 315 U. S. 262	26
Lewis v. *Reynolds*, 284 U. S. 281	29
Miller v. *Commissioner*, 115 F. 2d 479, certiorari denied 312 U. S. 703	28, 29

Cases—Continued

	Page
Neuberger v. *Commissioner*, 311 U. S. 83	26
New Colonial Co. v. *Helvering*, 292 U. S. 435	29
123 E. Fifty-Fourth Street v. *United States*, 157 F. 2d 68	30
Rodgers v. *United States*, 332 U. S. 371	12, 28
Stone v. *White*, 301 U. S. 532, rehearing denied, 302 U. S. 777	29
United States v. *Stewart*, 311 U. S. 60	26
White v. *United States*, 305 U. S. 281	29

Statutes:

Bankruptcy Act of 1898, c. 541, 30 Stat. 544, Chapter XI, as added by the Act of June 22, 1938 (Chandler Act), c. 575, 52 Stat. 840	4, 14
Internal Revenue Code:	
Sec. 23 (26 U.S.C. 1946 ed., Sec. 23)	10, 31
Sec. 53 (26 U.S.C. 1946 ed., Sec. 53)	13, 31
Sec. 56 (26 U.S.C. 1946 ed., Sec. 56)	7, 13, 14, 31, 32
Sec. 122 (26 U.S.C. 1946 ed., Sec. 122)	10, 16, 32, 33
Sec. 271 (26 U.S.C. 1946 ed., Sec. 271)	33, 34
Sec. 274 (26 U.S.C. 1946 ed., Sec. 274)	3
Sec. 292 (26 U.S.C. 1946 ed., Sec. 292)	7, 14, 34
Sec. 294 (26 U.S.C. 1946 ed., Sec. 294)	27, 34, 35
Sec. 295 (26 U.S.C. 1946 ed., Sec. 295)	25
Sec. 296 (26 U.S.C. 1946 ed., Sec. 296)	25
Secs. 291-298 (26 U.S.C. 1946 ed., Secs. 291-298)	28
Sec. 710 (26 U.S.C. 1946 ed., Sec. 710)	11, 35, 37
Sec. 711 (26 U.S.C. 1946 ed., Sec. 711)	37, 38
Sec. 728 (26 U.S.C. 1946 ed., Sec. 728)	13
Sec. 729 (26 U.S.C. 1946 ed., Sec. 729)	13
Sec. 3771 (26 U.S.C. 1946 ed., Sec. 3771)	8, 10, 15, 17, 38, 39
Sec. 3779 (26 U.S.C. 1946 ed., Sec. 3779)	8, 19, 20, 21, 25, 26, 27, 39, 45
Sec. 3780 (26 U.S.C. 1946 ed., Sec. 3780)	20, 25, 26, 46, 49
Revenue Act of 1942, Sec. 153, 56 Stat. 798	8, 15, 16

Miscellaneous:

H. Rep. No. 349, 79th Cong., 1st Sess. (1945 Cum. Bull. 566):	
P. 1	24
Pp. 5-6	19
P. 13	23
P. 18	22
P. 19	22
P. 20	22, 27
P. 21	22, 27

Miscellaneous—Continued

	Page
Report of the Joint Committee on Internal Revenue Taxation For Post-War Taxation, Report No. 1 (1945)	24
S. Rep. No. 1631, 77th Cong., 2d Sess. (1942-2 Cum. Bull. 504):	
P. 122	16
P. 123	17
P. 124	17
S. Rep. No. 458, 79th Cong., 1st Sess. (1945 Cum. Bull. 592):	
P. 1	24
P. 3	21
T. D. 5498, 1946-1 Cum. Bull. 209	26

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 70

JOHN E. MANNING, AS COLLECTOR OF INTERNAL REVENUE FOR THE FIFTH DISTRICT OF NEW JERSEY, PETITIONER

v.

SEELEY TUBE & BOX COMPANY, A CORPORATION OF THE STATE OF NEW JERSEY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court (R. 5-10) is reported in 76 F. Supp. 937. The opinion of the Court of Appeals (R. 13-17) is reported in 172 F. 2d 77.

JURISDICTION

The judgment of the Court of Appeals was entered on December 20, 1948 (R. 12). By order of Mr. Justice Burton, dated March 5, 1949, the time

within which a petition for a writ of certiorari might be filed was extended to and including May 18, 1949 (R. 18). The petition for a writ of certiorari was filed on May 12, 1949, and granted on June 27, 1949 (R. 20). The jurisdiction of this Court rests on 28 U. S. C., Section 1254.

QUESTION PRESENTED

Because the taxpayer had underpaid its corporate income and excess profits taxes for 1941, the Commissioner assessed deficiencies in the amount of the underpayments plus interest from the 1941 date when they should have been paid to the date of assessment. Later, after the close of the tax year 1943 it was determined that the taxpayer had suffered a net operating loss during 1943 which resulted in the abatement of the 1941 deficiencies through allowance of the net operating loss carryback deduction provided by Sections 23 (s) and 122 (a) and (b) of the Internal Revenue Code.

The question presented is whether the subsequent net operating loss also has the effect of denying to the Commissioner a right to the interest assessed for failure to pay the tax due and owing in 1941.

STATUTES INVOLVED

The pertinent statutory provisions are printed in the Appendix, *infra*, pp. 31-49.

STATEMENT

The facts are not in dispute. The District Court adopted as its findings of fact the stipulation of

facts upon which the case had been submitted to it. (R. 6.) They may be summarized as follows:

In its corporate income tax return filed with the Collector for the fiscal period beginning January 1, 1941, and ending September 30, 1941, taxpayer reported an income tax liability of $17,383.59.[1] This, it timely paid in four equal quarterly installments. Taxpayer also filed with the Collector its excess profits tax return for the same period, reporting excess profits tax liability of $27,514.41, likewise paid in time in four equal quarterly installments. These returns were filed on December 15, 1941 (R. 2, 3, 6), and the taxes were assessed by the Commissioner of Internal Revenue on January 12, 1942 (R. 3, 6).

Deficiencies in both income and excess profits taxes were assessed by the Commissioner on August 2, 1943, as follows: corporate income tax in the sum of $11,494.31, together with interest of $1,125.97, and excess profits tax in the sum of $36,294.99, together with interest in the sum of $3,555.42. Additional income and excess profits deficiency taxes were assessed on March 21, 1944, in the amounts of $418.43 and $606.43, together with interest in the sums of $56.90 and $82.66, respectively. (R. 3, 6.)[2]

---

[1] The corporate income tax included, in addition to the normal tax, the declared value excess profits tax and the defense tax. (R. 6, fn. 1.)

[2] Because the taxpayer had gone into bankruptcy on July 7, 1943, the assessments were perfected in the accelerated fashion provided for under Section 274 (a) of the Internal Revenue Code (R. 6). Thereafter, on January 3, 1945, taxpayer filed

The deficiency taxes were not paid (R. 6).

Subsequently, the taxpayer filed with the Collector its corporate income tax return for the fiscal period October 1, 1942, to September 30, 1943.[3] This disclosed a net operating loss of $231,514 for that period, but, after audit, the Commissioner determined that the net operating loss did not exceed $218,612.51. To this the taxpayer subsequently agreed. On March 15, 1944, the taxpayer filed with the Collector a claim for refund in the sum of $17,383.59, the full sum of the corporate income tax which it had paid for the fiscal year beginning January 1, 1941, and ending September 30, 1941; it also filed a claim for refund in the sum of $27,514.41, the full amount of the excess profits tax, which it had paid for the same period. These claims for refund were predicated upon the net operating loss carry-back provided by Section 122 of the Internal Revenue Code. Later, the taxpayer filed amended claims for refund in which it asserted, in addition to its claim for taxes paid, a right to the abatement of its tax liability for the deficiencies which the Commissioner had determined, including interest assessed on those deficiencies. (R. 4-5, 6-7.)

The Commissioner recognized the right of taxpayer to the asserted net operating loss carry-back

---

a petition for an arrangement under Chapter XI of the Bankruptcy Act of 1898, c. 541, 30 Stat. 544, as added by the Act of June 22, 1938 (Chandler Act), c. 575, 52 Stat. 840. By an amended plan of arrangement, approved June 4, 1945, the taxpayer was revested with title to all its assets. (R. 2.)

[3] An extension having been granted, the return was not filed until March 3, 1944 (R. 6).

and determined an overassessment of income and excess profits taxes for the period in question, January 1, 1941, to September 30, 1941. The Commissioner thereupon issued to taxpayer two certificates of overassessment, in one of which (No. 2824944) he certified an overassessment of corporate income tax in the sum of $28,877.90, and in the other (No. 2824943), he certified an overassessment of excess profits tax in the sum of $64,415.83. However, the Commissioner refused to abate the interest assessed on the deficiency taxes. (R. 5, 7.)

There was refunded to taxpayer the total sum of $40,384.66, representing the corporate income and excess profits taxes actually paid for the period in question, less $4,513.34, the interest assessed on the deficiency taxes for the same period, which had not been paid. The balance of the unpaid deficiency assessments was abated. The $4,513.34 withheld was applied to the payment of interest on the deficiency assessments. (R. 5, 7.)

In this suit, brought against the Collector for the recovery of the interest in the amount of $4,513.34 alleged to have been erroneously assessed and collected (R. 5-6), the District Court held that the application of the net loss carry-back provisions of the statute did not extinguish the liability for interest from the date the 1941 taxes had originally become due until the date the deficiencies were assessed, and accordingly entered judgment of no cause of action in favor of the Collector (R. 8-9, 11).

On appeal by the taxpayer, the Court of Appeals reversed with directions to enter judgment for the taxpayer (R. 12).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that the Collector was not entitled to withhold from refund to taxpayer the interest in the sum of $4,513.34 upon the amounts of the deficiencies determined by the Commissioner for the fiscal period commencing January 1, 1941, and ending September 30, 1941.

2. In failing to hold that the Collector was entitled to retain such interest.

3. In failing to hold that a net operating loss sustained in 1943, carried back to 1941, did not entitle taxpayer to a refund of interest assessed for failure to pay as and when due income and excess profits taxes prescribed by law to be returned and paid in 1941.

4. In reversing the judgment of the District Court and directing judgment for taxpayer.

5. In failing to affirm the judgment of the District Court.

SUMMARY OF ARGUMENT

The decision below places a premium on a taxpayer's failure to meet his tax obligations when they become due. A taxpayer whose circumstances are identical with those of the respondent, except

that he makes prompt and timely return and payment, would be entitled, upon determination that a net operating loss carry-back was available to him, only to a refund of the taxes paid. He would get no interest on the monies which were paid to, and held by, the Treasury until such determination. Yet, under the decision below, the delaying taxpayer retains the use of the money which he should have, but did not pay over, and is, nevertheless, not charged with interest covering the period of his delay.

Since, in tax cases, interest allowance to the Government rests on its necessity to collect a carefully estimated sum of money by a particular date in order to meet its anticipated expenditures, and is granted even in the absence of statutory provision, it is not to be denied unless Congress has specifically so provided. Here Congress has provided otherwise. Section 56 of the Code fixed December 15, 1941, as the time of payment. The correctness of the deficiency determinations thereafter assessed by the Commissioner is not in issue. Section 292 (a) of the Code requires that interest upon the amount determined as a deficiency be paid from the date prescribed for the payment of the tax to the date the deficiency was assessed.

The abatement of the principal amount of the deficiency by reason of the net operating loss carryback did not, *ab initio*, relieve taxpayer of its liability therefor; until the abatement, the Government was entitled to the entire tax. Contrary to

the ruling of the court below, taxpayer's liability on December 15, 1941, was not inchoate but actual and existent. That the Government had the right to hold and use the principal amount of the deficiency at least until after the close of the year in which taxpayer suffered its net operating loss, is made clear by Section 3771 (e). This section immunizes the Government from any claim to interest for such use during the period it holds taxes, later refundable through operation of a carry-back. This is striking evidence of the legality rather than the wrongfulness of the Government's use.

The legislative history of Section 153 of the Revenue Act of 1942, which enacted the carry-back deduction, establishes that Congress plainly intended that a taxpayer was not relieved of his duty to pay the tax of the prior year when and as due without regard to the possibility of a carry-back arising in a future year, and that the taxpayer's obligation to pay the earlier year's tax was actual and real. The action of Congress since 1942 further confirms this construction. The addition of Section 3779 to the Code in 1945, furnishing an elaborate procedure whereby a corporation expecting a carry-back might obtain extension of time for payment of taxes of an earlier year, subject, however, to collection of interest during the extended period, clearly establishes that Congress contemplated that the tax for the earlier year was due and payable even though later abated by a carry-back, and that, contrary to the holding of the court below, the

carry-back did not *ab initio*, relieve taxpayer of liability therefor; otherwise no provision for an extension nor any compensation for use of the money during the extended period would have been requisite or proper.

Moreover, the result reached below implies an incredible willingness on the part of Congress to endanger the prompt collection of the revenue and tends, besides, to encourage speculation with respect to the occurrence of future losses on the part of the irresponsible and unscrupulous at the expense of the Government and the general body of law abiding citizens.

Again, since the carry-back is a matter of legislative grace, it is to be strictly construed and not extended beyond clear provision.

Finally, overpayment must appear before a refund is authorized. Although the present action is technically deemed an action at law, it is in the nature of an action for money had and received; it is equitable in function, controlled by equitable principles, and designed to avoid unjust enrichment. Here taxpayer defaulted in the statutory obligation to pay its taxes when due in 1941, and the Government's retention of the compensation for the delay in payment does not constitute unjust enrichment. The taxpayer is unable to show that the Collector has money which belongs to it.

ARGUMENT

A Net Operating Loss Sustained in 1943 and Carried Back to 1941, Does Not Entitle Taxpayer to a Refund of Interest Assessed for Failure to Pay, as and When Due, Income and Excess Profits Taxes Prescribed by Law to Be Returned and Paid in 1941

The issue in this case arises whenever a taxpayer fails to file a correct return within the time prescribed by law, fails to pay the tax based upon such correct return, and subsequently, in a later year, suffers a net operating loss by virtue of which he becomes entitled to a net operating loss carry-back deduction. Internal Revenue Code, Sections 23 (s) and 122 (a) and (b), Appendix, *infra*, pp. 31, 32-33. There is no dispute that a taxpayer whose circumstances are identical with those of the respondent, except that he makes prompt and timely return and payment, would be entitled, upon determination that a net operating loss carry-back was available to him, only to a refund of the taxes paid. He would get no interest on the monies which were paid to, and held by, the Treasury, until such determination. For Section 3771 (e) of the Internal Revenue Code, Appendix, *infra*, p. 39, specifically provides that in the case of refunds or credits resulting from application of the carry-back—

> no interest shall be allowed or paid with respect to such part of the overpayment for any period before the filing of a claim for credit or refund of such part of the overpayment or

> the filing of a petition with the Board [Tax Court], whichever is earlier.

Yet, under the decision below, the delaying taxpayer retains the use of the money which he should have, but did not pay over, and is, nevertheless, not charged with interest covering the period of his delay.[4] In other words, the majority of taxpayers who meet their lawful obligations get neither the use of the money nor interest as compensation for their loss of that use, while the delinquent taxpayer retains the use of the money and is not required to compensate the Government for its corresponding loss.[5] Thus, the effect of the decision

---

[4] On the basis of a field survey made during March, 1949, the Treasury Department has reported that there were 11,259 previously adjusted cases involving this issue in 1947, and 14,962 such cases in 1948. It is estimated that from 1945 to 1948, inclusive, there were 42,721 cases involving this issue and that, in 1949, there will be 15,912 such cases. The amount of interest revenue involved in these cases through 1949 is estimated to be $39,720,925. See Government's petition for a writ of certiorari, pp. 6-7. Cases involving unused excess profits carry-back raise problems identical with those arising from the net operating loss carry-back. See Internal Revenue Code, Section 710 (c) (3), Appendix, *infra*, pp. 35-37.

[5] Suppose, for example, that taxpayers A and B each have the same income, deductions, etc., for the taxable year 1941 and that the correct tax for each, computed without regard to any carry-back, is $1,000. Taxpayer A correctly reports and pays his $1,000 on March 15, 1942. Taxpayer B, due to certain errors, reports and pays only $400 of tax. Taxpayers A and B each sustain a net operating loss in 1943 which, when carried back to 1941, offsets their entire 1941 income. Taxpayer A files claim for refund on his entire $1,000 tax for 1941 on January 1, 1944. On the same date, taxpayer B files claim for refund of $400 tax for 1941. Both claims will be allowed, and interest on the overpayments will be allowed in each case from January 1, 1944. No deficiency will be assessed in the case of B, but unless interest is charged B on

below is to put a premium on a taxpayer's failure to meet his tax obligations when they become due.

Congress intended no such discrimination. Interest is "but the compensation due for the use of money" or an allowance "for damages caused by delay in discharging a duty" (*Billings* v. *United States*, 232 U. S. 261, 285), and is granted even in absence of statutory provisions therefor. Recently, in *Rodgers* v. *United States*, 332 U. S. 371, 374, this Court, reaffirming "its holding" in the *Billings* case, *supra*, stated—

> that the Government does suffer recoverable damages if a taxpayer fails to pay taxes when due and is therefore equitably entitled to interest.

Accordingly, since, in tax cases, interest allowance to the Government rests "on the basic necessity of the Government to collect a carefully estimated sum of money by a particular date in order to meet its anticipated expenditures" (*Rodgers* v. *United States, supra*, p. 374), and it is granted even in the absence of statutory provision therefor

---

$600 from March 15, 1942, to January 1, 1944, B will be placed in a position more favorable than A. The taxpayer who incorrectly reported his income will be the one placed in the favored position. The Government had the right to receive $1,000 from both A and B on March 15, 1942, and the right to hold and use that money, interest-free, until at least January 1, 1944. Under the opinion of the court below, not only does the Government lose the use of B's $600 for that period, but B, who reported his tax incorrectly, has that $600 to use in his business or otherwise, while A, who reported his tax correctly, does not have the use of a similar amount of money.

(*Billings* v. *United States, supra*), it is not to be denied unless Congress has specifically so provided. Here Congress has provided otherwise.

A. *The respondent's liability for tax was actual and existent on December 15, 1941.*—Taxpayer's fiscal period began on January 1, 1941, and ended on September 30, 1941 (R. 2-3); hence, pursuant to Section 53 (a) (1) of the Internal Revenue Code (Appendix, *infra*, p. 31), its returns were required to be made on or before December 15, 1941.[6] Section 56 of the Code (Appendix, *infra*, pp. 31-32), as applied to this case, fixed the time of payment and required that "the *total* amount of tax imposed by this chapter" (italics supplied) should be paid on the same date, i.e., December 15, 1941.[7] There is and was no dispute, here relevant, with respect to the correctness of the deficiency determinations assessed by the Commissioner principally on August 2, 1943, and subsequently, in minor amounts, on March 21, 1944 (R. 3).[8] Accordingly, the amount so determined by the Commissioner plus the amount paid by taxpayer was the "total amount of tax

---

[6] The excess profits tax was governed, so far as here relevant, by provisions applicable to the income tax. Internal Revenue Code, Sections 728 and 729. (26 U.S.C. 1946 ed., Secs. 728, 729).

[7] The option provided in Section 56 (b) (Appendix, *infra*, p. 32), for installment payments does not affect the discussion and will be disregarded.

[8] For reasons not pertinent to this action, on May 17, 1944, the Commissioner abated part of the deficiencies assessed on March 21, 1944 (R. 4). Consequently, out of the total interest in the amount of $4,513.34 here involved, only $82.66 is attributable to the March 1944, deficiency.

imposed" (Section 56 (a)). This amount, under Section 56 as applied to this case, was due and owing by taxpayer and should have been paid on December 15, 1941. Full payment, not having then been made, Section 292 (a), (Appendix, *infra*, p. 34), required that—

> interest upon the amount determined as a deficiency * * * be paid * * * from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed.

Hence, the interest here involved was that which accrued between the due date of the payment of the tax on December 15, 1941, and the date of the deficiency assessments of August 2, 1943, and March 21, 1944 (R. 2-4).[9]

B. *The carry-back provisions of the Internal Revenue Code were not intended to excuse a failure to make timely payment of taxes.*—The abatement of the principal amount of the deficiency by reason of the net operating loss carry-back did not, *ab initio*, relieve the taxpayer of its liability therefor. It was not until approximately ten months after

---

[9] The recent decision of this Court in *City of New York* v. *Saper*, 336 U.S. 328, denying interest on tax claims after bankruptcy, if at all applicable, would diminish the Government's interest claim only to a minor extent, inasmuch as the date of bankruptcy was July 7, 1943 (R. 2). In any event, by a plan of arrangement under Chapter XI of the Bankruptcy Act of 1898, c. 541, 30 Stat. 544, as added by the Act of June 22, 1938, c. 575, 52 Stat. 840, taxpayer, on June 4, 1945, was revested with title to all its assets. See fn. 2, *supra*, pp. 3-4.

the tax here involved was due and payable that the net operating loss carry-back was first enacted by Section 153 (a) of the Revenue Act of 1942, which amended Section 122 (b) of the Internal Revenue Code (Appendix, *infra*, pp. 32-33). The extinguishment of the tax liability for the fiscal year 1941 resulted, not from a determination that the tax as assessed was illegal, but from the application of this new statutory provision of the Code. The application of this section was to grant a new deduction which had the effect of abating the existing tax deficiency for 1941, but, until the abatement, the Government was entitled to the entire tax. Thus, contrary to the ruling of the court below, taxpayer's liability on December 15, 1941, was not "inchoate" (R. 16) but actual and existent.

That the Government had the right to hold and use the principal amount of the deficiency at least until after the close of the year in which taxpayer suffered its net operating loss is made perfectly clear by Section 3771 (e), already referred to, *supra*, pp. 10-11, which immunizes the Government from any claim to interest for such use. Were the Government's use of such monies illegal, it would be liable for interest. That is the teaching of the decisions relied on by the court below (R. 17), in which the tax was erroneously or illegally collected in the first place. Here, however, there is no question that the deficiencies were correctly assessed and Section 3771 (e) indicates plainly that

the Government was entitled to the use which taxpayer denied it by failing to make payment.

The Congressional committee which created the net operating loss carry-back deduction plainly contemplated that the possibility of a future carry-back would not relieve the taxpayer of its duty to pay the tax of the prior year when and as due. The carry-back deduction which was enacted, as above stated, by Section 153 of the Revenue Act of 1942, was originally proposed by the Senate Finance Committee whose report points out that (S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 122-123 (1942-2 Cum. Bull. 504, 596-597)):

> This section, for which there is no corresponding provision in the House bill, amends section 122 of the Code. For the first time a carry-back of the net operating loss is allowed. * * *
>
> * * * * * * *
>
> A taxpayer entitled to a carry-back of a net operating loss or an unused excess profits credit (see sec. 204 of the bill) will not be able to determine the deduction on account of such carry-back until the close of the future taxable year in which he sustains the net operating loss or has the unused excess profits credit.

The taxpayer owed a tax which was actual and real, and, contrary to the holding of the court below, did not amount to "nothing" (R. 17), for, as the Fi-

nance Committee went on to say (S. Rep. No. 1631, *supra*, p. 123 (1942-2 Cum. Bull. 504, 597)):

> He must therefore file his return and *pay his tax without regard to such deduction*, and must file a claim for refund at the close of the succeeding taxable year when he is able to determine the amount of such carry-back. (Italics supplied.)

It follows that where, as here, the taxpayer failed to meet this obligation and failed to pay the tax when due, it became liable for interest.

This conclusion finds added confirmation in the next succeeding sentence of this Committee Report, when, in recommending the provision, which subsequently became Section 3771 (e) of the Code already referred to, *supra*, pp. 10-11, the Senate Committee explained that (S. Rep. No. 1631, *supra*, pp. 123-124 (1942-2 Cum. Bull. 504, 597)):

> Inasmuch as any overpayment resulting from the deduction of such carry-back does not occur, as a practical matter, until the net operating loss or the unused excess profits credit for the future taxable year is determined, and inasmuch as it is desirable to insure promptness in the filing of claims to inform the Commissioner that such deductions have been determined, this section provides that no interest will be allowed with respect to any such overpayment for any period before the claim therefor is filed, or a petition asserting such overpayment is filed with the Board of Tax Appeals, whichever is earlier.

Since the overpayment does not occur until the future year when the net operating loss is determined, the Government was here entitled to the use of the tax money from the date the tax was due in December 1941, to the date when the overpayment occurred upon determination of the loss in the future taxable year, and, on the other hand, was under no liability to pay interest for such use. See p. 11, *supra*.

The decision of the District Court in *Brandtjen & Kluge, Inc.* v. *United States*, 78 F. Supp. 509 (D. Minn.), following the decision of the District Court below, directly supports the Collector's contention here. There the taxpayer had paid a deficiency with interest and the question was whether or not taxpayer was entitled to a refund of the interest when, due to allowance of a carry-back excess profits credit, the deficiency concededly was refundable. Here, on the other hand, taxpayer had never paid the interest and the Government withheld it in refunding overpayments (R. 5, 7). This factual difference, though mentioned by the Court of Appeals (R. 17), seems immaterial. Thus, the denial by the District Court of the interest refund in the *Brandtjen & Kluge* case squarely supports the contentions of the Government here.

C. *The Congressional understanding is in accord with the Collector's view, not that of the court below.*—The action of Congress since 1942 further

confirms the construction for which the Collector here contends. In recommending the Tax Adjustment Bill of 1945, the Ways and Means Committee described the defect and proposed remedy as follows (H. Rep. No. 849, 79th Cong., 1st Sess., pp. 5-6 (1945 Cum. Bull. 566, 569)):

> *Speeding up refunds from carry-backs*
>
> Under existing law, refunds resulting from the carry-back of net operating losses and unused excess-profits credits cannot be made until a considerable length of time after the loss or unused credit arises. The claim cannot be filed until after the year in which the loss or unused credit arises; for example, a claim arising from a loss in 1945 cannot be made until after the close of the year, when the amount of the loss has been determined. Moreover, following the filing of the claim, many months are usually required for auditing the returns for all years affected and for reviewing the claim before a refund can be finally made.
>
> To speed up the operation of the carry-back refund procedure, so that taxpayers may have the benefits of a currently improved cash position for reconversion, the bill provides (1) deferment of current tax payments on the basis of anticipated losses and unused credits; and (2) prompt payment of refunds after the loss or unused credit has occurred.

The first of these purposes was carried out by adding Section 3779 and the second by adding Section

3780 to the Internal Revenue Code (Appendix, *infra*, pp. 39-49), by the Tax Adjustment Act of 1945, c. 340, 59 Stat. 517, Section 4 (a). Section 3779 permits a corporate taxpayer anticipating a loss or unused credit for the current year, upon submission of an appropriate statement, to elect to defer payments of the preceding year's taxes, the amount deferred not exceeding the anticipated refund that would result from the carry-back of the loss or unused credit. This extension privilege is made operative with respect to taxes otherwise due in any taxable year ending on or after September 30, 1945. The second part of the plan to aid the cash position of a taxpayer is incorporated in Section 3780, and permits a quick refund technique known as a "tentative carry-back adjustment". Section 3780 goes into effect after the close of a taxable year in which a taxpayer finds that he has sustained a net operating loss or had an unused excess profits credit. He may then file an application for credit or refund of overpayments of prior years' taxes, which will result from carry-back of such loss or unused credit. The Commissioner is required to act upon such an application for a quick refund within ninety days (Section 3780 (b), Appendix, *infra*, p. 48), subject to later review (Section 3780 (c), Appendix, *infra*, p. 49).[10]

[10] The relief by way of quick refund afforded by Section 3780 is applicable both to individuals and corporations, but the extension of time for payment of taxes provided by Section 3779 is only afforded to corporations expecting carry-backs.

Section 3779 (i), quoted for convenience in the footnote,[11] bears most directly on the problem of interest involved in this case. The purpose and operation of this provision was explained in detail in the House Committee Report [12] (H. Rep. No.

---

[11] SEC. 3779 [As added by Sec. 4 (a) of the Tax Adjustment Act of 1945, c. 340, 59 Stat. 517]. EXTENSIONS OF TIME FOR PAYMENT OF TAXES BY CORPORATIONS EXPECTING CARRY-BACKS.

* * * * * *

(i) *Interest.*—In the case of an amount the time for payment of which has been extended, there shall be collected as part of such amount interest from the dates on which payments would have been required if there had been no extension and the taxpayer had elected to pay the tax in four equal installments as provided in section 56 (b)—

(1) upon so much of such amount as is satisfied under section 3780 (b) by applying or crediting thereto, within the period of extension, a decrease in tax determined in connection with an application under section 3780 (a), interest at the rate of 3 per centum per annum to the date of such satisfaction, except that on so much of such satisfied amount as is not in excess of the amount of the deficiencies assessed under section 3780 (b) and which is not so satisfied, the rate shall be 6 per centum per annum; and

(2) upon the remainder of the amount the time for payment of which has been extended, interest at the rate of 6 per centum per annum to the date such amount is paid.

If the Commissioner determines that during the period of extension credit or refund of an overpayment has been allowed or made, or a deficiency assessed, affecting the amount to which the extension relates and that the taxpayer could not have taken such overpayment or deficiency into account in the statement or a revised statement, appropriate adjustment shall be made in the interest.

[12] The Senate Committee concurred with the House Committee in recommending the bill and its report referred to the quoted report of the House Committee for detailed discussion of the provisions here pertinent. S. Rep. No. 458, 79th Cong., 1st Sess., p. 3 (1945 Cum. Bull. 592, 594).

849, *supra*, pp. 18-20 (1945 Cum. Bull. 578-579)), which, as far as here pertinent, reads as follows (pp. 19-20):

> It is to be particularly noted that interest on amounts the time for payment of which is extended under section 3779 will be payable at the rate of 3 percent per annum only if such amounts are satisfied by applying or crediting thereto, within the period of extension, a decrease in tax determined in respect of an application for a tentative carry-back adjustment. To the extent that such amounts are not so satisfied, interest is payable at the rate of 6 percent per annum. Thus if an extension is terminated either by action of the taxpayer or the Commissioner, interest is payable on the amount to which such termination relates at the rate of 6 percent per annum to the date of payment. Likewise, if the taxpayer pays some portion of the tax, the time for payment of which has been extended, prior to the termination of the extension, or if the taxpayer fails to file an application for a tentative carry-back adjustment prior to the last day of the month in which falls the date prescribed by law (including any extension of time granted the taxpayer) for filing the return for the year of the expected loss or unused credit, interest is payable at the rate of 6 percent per annum to the date of payment. If part of an amount the time for payment of which has been extended is satisfied by applying or crediting thereto a decrease determined in respect of an application for a tentative carry-back adjustment and

part is not so satisfied, interest is to be payable on the first part at the rate of 3 percent and on the second part at the rate of 6 percent per annum.

An illustration of the general operation of Sec. 3779, afforded by the House Committee in its report is quoted in the footnote.[13]

The Congressional committees which approved Sections 3779 and 3780 state that these proposals,

---

[13] H. Rep. No. 849, *supra*, p. 13 (1945 Cum. Bull. 566, 574): Corporation A, which keeps its books and makes its tax returns on the calendar year basis, files its income and excess profits tax returns for 1945 on March 15, 1946. Such returns show that Corporation A owes $10,000 income tax and $15,000 excess profits tax for 1945. Corporation A, however, expects that its operations for 1946 will result in an unused excess profits credit of $20,000 for that year. The corporation further determines that such unused excess profits credit, if it in fact arises, when carried back to 1944 will result in a decrease of $9,100 in the aggregate of its taxes for 1944 and will not affect the amount of tax for any other year. Corporation A, therefore, may extend the time for payment of $9,100 of the taxes which it owes for 1945 and which would otherwise have to be paid on March 15 and on subsequent installment dates in 1946. Such extension in general will run until March 31, 1947, or, if Corporation A files an application for a tentative carry-back adjustment, pursuant to the provisions of section 3780, with respect to the unused excess profits credit of 1946, until the date on which notice is mailed by registered mail by the Commissioner to the taxpayer that such application is allowed or disallowed. Provisions are made for the payment of interest on the tax the time for payment of which was extended. *In general, such interest will be at the rate of 3 percent per annum upon an amount extended equal to the net reduction in Corporation A's taxes for 1944 and 1945 attributable to any carry-backs from 1946, as determined under an application filed under section 3780 (a) for a tentative carry-back adjustment, and at the rate of 6 percent per annum upon the remainder of the amount the time for payment of which was extended.* [Italics supplied.]

inter alia, derived from recommendations made by the Joint Committee on Internal Revenue Taxation For Post-War Taxation (H. Rep. No. 849, *supra,* p. 1; S. Rep. No. 458, *supra,* p. 1 (1945 Cum. Bull. 566, 592). Report No. 1 (1945) of this Joint Committee, treating particularly with interest on tax payments which were to be deferred under its proposal eventually enacted as Section 3779, explains (p. 8):

> 5. *Interest on deferred tax payments.*
>
> Under the proposed plan, all deferments of tax would bear interest. If the deferment exceeded the ultimate refund, the usual rate of 6 percent per annum would apply to the excess. Deferments not in excess of the ultimate refund would bear interest at half the usual rate on past due taxes (3 percent). This interest charge would discourage taxpayers from using the deferment privilege unless there were real need for cash. In the absence of such an interest charge, a strong incentive would exist for corporate officers to claim deferment whether or not the funds were needed. The difficulties connected with the operation of the plan are such that firms with easy access to alternative sources of funds should not be encouraged to make use of tax deferment. Moreover, the policy of charging interest would be in harmony with the existing policy that refunds due to carry-backs do not bear interest prior to the filing of a valid claim for refund. On the other hand, the suggested interest charge on

proper deferments is not high enough to discourage taxpayers in real need of funds.

Thus, Section 3779 (i) and the Committee Reports recommending it, clearly manifest that Congress understood the state of the law to be, during the years involved in this case, that interest was payable on taxes due for a prior year even though subsequently abated by operation of a net loss carry-back arising in a later year. It is noteworthy that the Internal Revenue Code makes careful provision for interest at 6 percent in cases where extensions in tax payments in general are granted. Sections 295 and 296 (26 U.S.C. 1946 ed., Secs. 295, 296). Section 3779(i) represents the exercise of special legislative grace, whereby the interest is reduced to 3 percent during the extended period provided that it turns out the tax for the earlier year is abated through operation of a loss carry-back in the succeeding year determined in connection with an application under Section 3780 (a). However, save for this limited exception, the customary 6 percent interest is to be collected on the unpaid tax for the preceding year from the date due until the date it is paid. The exception, as has been seen, was to apply only in tax years ending on or after September 30, 1945. Had Congress, in 1945, not understood, in consonance with the Collector's contention here, that interest was owing and collectible under the state of the law here applicable on the earlier year's unpaid tax, despite the subse-

quent year's carry-back, there would have been no need for the relief provided by Section 3779 (i) for the future. Moreover, under the limited alleviation thus granted, interest is never excused, merely diminished in the special instance where an extension has been granted under Section 3779 and a quick refund allowed under Section 3780.[14] In all other cases, even under the Tax Adjustment Act of 1945, *supra*, it continues collectible in the full 6 percent.[15]

Indeed, if the decision below is correct, these elaborate provisions of Section 3779, enacted in 1945, authorizing an extension in payment of an earlier year's tax, become meaningless; under the pre-existing law the taxpayer in this case has obtained a two years' extension of its taxes,[16] without any formality, such as filing the detailed statement required under Section 3779 (b), and without payment of 3 percent interest on the amount of 1941 taxes abated by the carry-back or any interest at

---

[14] Thus, Treasury Regulations, promulgated to carry out the provisions of Section 3779, provide: "SEC. 474.9. INTEREST.—Interest is payable on any amount the time for payment of which is extended under section 3779." T. D. 5498, 1946-1 Cum. Bull. 209, 218.

[15] It is settled that subsequent legislation and legislative history may properly be considered to assist in interpretation of prior legislation upon the same subject. *Brewster* v. *Gage*, 280 U.S. 327, 337; *Burnet* v. *Guggenheim*, 288 U.S. 280, 283; *United States* v. *Stewart*, 311 U.S. 60, 64; *Neuberger* v. *Commissioner*, 311 U.S. 83, 89-90; *Great Northern Ry. Co.* v. *United States*, 315 U.S. 262, 277; *Commissioner* v. *Lamont*, 156 F. 2d 800, 804 (C.A. 2d), certiorari denied, 329 U.S. 782.

[16] In fact, the only taxes the time for payment of which, under Section 3779, may be extended are those of the year *immediately preceding* the year of the expected loss.

all. The decision below must also authorize such extension without interest in favor of individuals, thus draining of sense the careful Congressional limitation in Section 3779 of the extension privilege to corporate taxpayers. In brief, Section 3779 clearly establishes that Congress, in 1945, contemplated that the tax for an earlier year was due and payable even though later abated by a carry-back, and that, contrary to the holding of the court below, the carry-back did not *ab initio* relieve the taxpayer of liability therefor; otherwise no provision for an "extension" would have been necessary.[17]

The result reached in the court below implies an incredible willingness on the part of Congress to endanger the prompt collection of the revenue and to ignore "the basic necessity of the Government to collect a carefully estimated sum of money by a particular date in order to meet its anticipated

---

[17] Congress clearly indicated that the extension privilege was intended primarily for that part of the earlier year's taxes subject to abatement by carry-back, since it imposed a 5 percent penalty when the amount of the taxes extended under Section 3779 substantially exceeded the amount abated by carry-backs. See Section 294 (e) of the Internal Revenue Code added by Section 4 (b) of the Tax Adjustment Act of 1945, *supra*. (H. Rep. No. 849, *supra*, p. 20 (1945 Cum. Bull. 566, 579)). Moreover, significantly, the Committee observed (H. Rep. No. 849, *supra*, pp. 20-21 (1945 Cum. Bull. 566, 579-580)):

> It is to be noted that a taxpayer may always avoid the penalty imposed under section 294 (e) by paying the tax, the time for payment of which has been extended, at any time prior to the close of the taxable year in which the extension was made. In such case, *interest will be payable at the rate of 6 percent per annum* but there will be no penalty of 5 percent. [Italics supplied.]

expenditures." *Rodgers* v. *United States*, 332 U. S. *supra*, p. 374. Such loose treatment of the needs of the federal fisc is belied by the careful provisions for interest on unpaid taxes contained in the Internal Revenue Code and other additions to tax on account of deficiency and non-payment (Sections 291-298, 26 U. S. C. 1946 ed., Secs. 291-298). The decision below tends to encourage speculation on the part of the irresponsible and unscrupulous at the expense of the Government and the general body of law abiding citizens who obey the mandate of the statute and choose not to affect a Cassandra-like gift of divination revealing the occurrence of operating business losses two years hence.[18]

D. *The respondent's claim is barred on legal and equitable principles alike.*—Congress has entered into no contract with taxpayers to allow a carry-back for all future years; the public interest, urgent necessities of the revenue may require its repeal before becoming operative as to a given earlier tax year. In the meantime, Congress intends that taxes be regularly and promptly paid. Thus, in *Miller* v. *Commissioner*, 115 F. 2d 479, certiorari denied, 312 U. S. 703, the Court of Appeals for the Ninth Circuit held that the repeal by a later Act of the carry-over provision of a loss

---

[18] Indeed, here, the abating carry-back was mere coincidence and the deficiencies could not have been due to anticipation of net operating losses, since the carry-back provision, as already noted, *supra*, pp. 14-15, was not enacted until approximately ten months after the 1941 tax was payable.

suffered in an earlier year was valid. The court said (p. 480):

> The provision contained in the Revenue Act of 1932, permitting the carrying forward of a net loss, was a matter of legislative grace. It was within the power of Congress to revoke the privilege.

Again, here also, the carry-back, being solely dependent upon legislative grace is not to be extended beyond clear provision. *New Colonial Co.* v. *Helvering,* 292 U. S. 435, 440; *White* v. *United States,* 305 U. S. 281, 292; *Deputy* v. *duPont,* 308 U. S. 488.

Moreover, an action such as that at bar to recover on a claim for refund is in the nature of an action for money had and received and it is incumbent upon the claimant to show that the United States has money which belongs to it. An overpayment must appear before refund is authorized; although at law, such an action is equitable in function. It is predicated upon rights equitable in nature, to avoid unjust enrichment by the defendant at the expense of the plaintiff, and it is controlled by equitable principles. *Lewis* v. *Reynolds,* 284 U. S. 281; *Stone* v. *White,* 301 U. S. 532, rehearing denied, 302 U. S. 777. Here taxpayer defaulted in the obligation imposed by the statute to pay its taxes when due in 1941. The Government's retention of compensation for the delayed payment does not constitute unjust enrichment. Since the tax-

payer has no equity, the Collector's legal title should prevail on familiar principles. *Champ Spring Co.* v. *United States*, 47 F. 2d 1, 3 (C. A. 8th), certiorari denied, 283 U. S. 852; *123 East Fifty-Fourth Street* v. *United States*, 157 F. 2d 68 (C. A. 2d).

CONCLUSION

The decision of the Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
THERON LAMAR CAUDLE,
Assistant Attorney General.
ELLIS N. SLACK,
LEE A. JACKSON,
I. HENRY KUTZ,
Special Assistants to the Attorney General.

OCTOBER 1949.

APPENDIX

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(s) [As added by Sec. 211 (a) of the Revenue Act of 1939, c. 247, 53 Stat. 862] *Net Operating Loss Deduction.*—For any taxable year beginning after December 31, 1939, the net operating loss deduction computed under section 122.

(26 U. S. C. 1946 ed., Sec. 23.)

SEC. 53. TIME AND PLACE FOR FILING RETURNS.

(a) *Time for Filing.*—

(1) *General rule.*—Returns made on the basis of the calendar year shall be made on or before the 15th day of March following the close of the calendar year. Returns made on the basis of a fiscal year shall be made on or before the 15th day of the third month following the close of the fiscal year.

* * * * *

(26 U. S. C. 1946 ed., Sec. 53.)

SEC. 56. PAYMENT OF TAX.

(a) *Time of Payment.*—The total amount of tax imposed by this chapter shall be paid on the fifteenth day of March following the close of the calendar year, or, if the return

should be made on the basis of a fiscal year, then on the fifteenth day of the third month following the close of the fiscal year.

(b) *Installment Payments.*—The taxpayer may elect to pay the tax in four equal installments, in which case the first installment shall be paid on the date prescribed for the payment of the tax by the taxpayer, the second installment shall be paid on the fifteenth day of the third month, the third installment on the fifteenth day of the sixth month, and the fourth installment on the fifteenth day of the ninth month, after such date. If any installment is not paid on or before the date fixed for its payment, the whole amount of the tax unpaid shall be paid upon notice and demand from the collector.

* * * * *

(26 U. S. C. 1946 ed., Sec. 56.)

SEC. 122 [As added by Sec. 211 (b) of the Revenue Act of 1939, supra]. NET OPERATING LOSS DEDUCTION.

(a) *Definition of Net Operating Loss.*—As used in this section, the term "net operating loss" means the excess of the deductions allowed by this chapter over the gross income, with the exceptions and limitations provided in subsection (d).

(b) [As amended by Sec. 153 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798]. *Amount of Carry-Back and Carry-over.*—

(1) *Net operating loss carry-back.*—If for any taxable year beginning after December 31, 1941, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the second preceding taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6), and (B) by determining the net operating loss deduction for such second preceding taxable year without regard to such net operating loss.

* * * * *

26 U. S. C. 1946 ed., Sec. 122.)

SEC. 271. DEFINITION OF DEFICIENCY.

As used in this chapter in respect of a tax imposed by this chapter "deficiency" means—

(a) The amount by which the tax imposed by this chapter exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; or

(b) If no amount is shown as the tax by the taxpayer upon his return, or if no return is

made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency; but such amounts previously assessed, or collected without assessment, shall first be decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax.

(26 U. S. C. 1946 ed., Sec. 271.)

SEC. 292. INTEREST ON DEFICIENCIES.

(a) [As amended by Sec. 2 (a) of the Act of December 17, 1943, c. 346, 57 Stat. 601] *General Rule.*—Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed * * *.

(26 U.S.C. 1946 ed., Sec. 292.)

SEC. 294. ADDITIONS TO THE TAX IN CASE OF NON-PAYMENT.

(a) *Tax Shown on Return.*

(1) *General Rule.*—Where the amount determined by the taxpayer as the tax imposed by this chapter, or any installment thereof, or any part of such amount or in-

stallment, is not paid on or before the date prescribed for its payment, there shall be collected as a part of the tax, interest upon such unpaid amount at the rate of 6 per centum per annum from the date prescribed for its payment until it is paid.

* * * * *

(b) *Deficiency.*—Where a deficiency, or any interest or additional amounts assessed in connection therewith under section 292, or under section 293, or any addition to the tax in case of delinquency provided for in section 291, is not paid in full within ten days from the date of notice and demand from the collector, there shall be collected as part of the tax, interest upon the unpaid amount at the rate of 6 per centum per annum from the date of such notice and demand until it is paid. If any part of a deficiency prorated to any unpaid installment under section 272 (i) is not paid in full on or before the date prescribed for the payment of such installment, there shall be collected as part of the tax interest upon the unpaid amount at the rate of 6 per centum per annum from such date until it is paid.

(26 U.S.C. 1946 ed., Sec. 294.)

SEC. 710 [As added by Sec. 201 of the Second Revenue Act of 1940, c. 757, 54 Stat. 974]. IMPOSITION OF TAX.

* * * * *

(c) [As added by Sec. 2 (b) of the Excess Profits Tax Amendments of 1941, c. 10, 55 Stat. 17, and amended by Sec. 204 of the Revenue Act of 1942, *supra*]. *Unused Excess Profits Credit Adjustment.*—

(1) *Computation of unused excess profits credit adjustment.*—The unused excess profits credit adjustment for any taxable year shall be the aggregate of the unused excess profits credit carry-overs and unused excess profits credit carry-backs to such taxable year.

* * * * *

(3) *Amount of unused excess profits credit carry-back and carry-over.*—

(A) *Unused excess profits carry-back.*—If for any taxable year beginning after December 31, 1941, the taxpayer has an unused excess profits credit, such unused excess profits credit shall be an unused excess profits credit carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such unused excess profits credit over the adjusted excess profits net income for the second preceding taxable year computed for such taxable year (i) by determining the unused excess profits credit adjustment without regard to such unused excess profits credit, and (ii) without the de-

duction of the specific exemption provided in subsection (b) (1).

* * * * *

(26 U.S.C. 1946 ed., Sec. 710.)

SEC. 711 [As added by Section 201 of the Second Revenue Act of 1940, *supra*]. EXCESS PROFITS NET INCOME.

(a) *Taxable years beginning after December 31, 1939.*—The excess profits net income for any taxable year beginning after December 31, 1939, shall be the normal-tax net income, as defined in section 13 (a) (2), for such year, except that the following adjustments shall be made:

(1) *Excess profits credit computed under income credit.*—If the excess profits credit is computed under section 713, the adjustments shall be as follows:

* * * * *

(J) [As added by Sec. 210 (a) of the Revenue Act of 1942, *supra*] *Net operating loss deduction adjustment.*—The net operating loss deduction shall be adjusted as follows:

(i) In computing the net operating loss for any taxable year under section 122 (a), and the net income for any taxable year under section 122 (b), no deduction shall be allowed for any excess profits tax imposed by this

subchapter, and, if the excess profits credit for such taxable year was computed under section 714, the deduction for interest shall be reduced by the amount of any reduction under paragraph (2) (B) for such taxable year; and

* * * * *

(26 U.S.C. 1946 ed., Sec. 711.)

SEC. 3771. INTEREST ON OVERPAYMENTS.

(a) *Rate.*—Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the rate of 6 per centum per annum.

(b) *Period.*—Such interest shall be allowed and paid as follows:

(1) *Credits.*—In the case of a credit, from the date of the overpayment to the due date of the amount against which the credit is taken, but if the amount against which the credit is taken is an additional assessment of a tax imposed by the Revenue Act of 1921, 42 Stat. 227, or any subsequent Revenue Act, then to the date of the assessment of that amount.

(2) *Refunds.*—In the case of a refund, from the date of the overpayment to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner, whether or not such refund check is accepted by the

taxpayer after tender of such check to the taxpayer. The acceptance of such check shall be without prejudice to any right of the taxpayer to claim any additional overpayment and interest thereon.

* * * * *

(e) [As added by Sec. 153 (d) of the Revenue Act of 1942, *supra*] *Claims Based on Carry-Back of Loss or Credit.*—If the Commissioner determines that any part of an overpayment is attributable to the inclusion in computing the net operating loss deduction for the taxable year of any part of the net operating loss for a succeeding taxable year or to the inclusion in computing the unused excess profits credit adjustment for the taxable year of any part of the unused excess profits credit for a succeeding taxable year, no interest shall be allowed or paid with respect to such part of the overpayment for any period before the filing of a claim for credit or refund of such part of the overpayment or the filing of a petition with the Board, whichever is earlier.

(26 U.S.C. 1946 ed., Sec. 3771.)

SEC. 3779. [As added by Section 4 (a) of the Tax Adjustment Act of 1945, c. 340, 59 Stat. 517]. EXTENSIONS OF TIME FOR PAYMENT OF TAXES BY CORPORATIONS EXPECTING CARRY-BACKS.

(a) *In General.*—If a corporation, in any taxable year ending on or after September

30, 1945, files with the collector a statement, as provided in subsection (b), with respect to an expected net operating loss carry-back or unused excess profits credit carry-back from such taxable year, the time for payment of all or part of any tax imposed by chapter 1 or 2 for the taxable year immediately preceding such taxable year shall be extended, to the extent and subject to the conditions and limitations hereinafter provided in this section.

(b) *Contents of Statement.*—The statement with respect to an expected carry-back referred to in subsection (a) of this section shall be sworn to in the manner prescribed by section 52 in the case of a return and shall be filed at such time and in such manner and form as the Commissioner, with the approval of the Secretary, may by regulations prescribe. Such statement shall set forth that the corporation expects to have a net operating loss carry-back, as provided in section 122 (b), or an unused excess profits credit carry-back, as provided in section 710 (c)(3), from the taxable year in which such statement is made, and shall set forth, in such detail and with such supporting data and explanation as such regulations shall require—

(1) the estimated amount of the expected net operating loss or unused excess profits credit;

(2) the reasons, facts, and circumstances which cause the corporation to ex-

pect such net operating loss or unused excess profits credit;

(3) the amount of the reduction, attributable to the expected carry-back, in the aggregate of the taxes previously determined for all taxable years affected by the carry-back prior to the taxable year of the expected loss or unused credit; such taxes previously determined being ascertained in accordance with the method prescribed in section 3801 (d); and such reduction being determined by applying the expected carry-back in the manner provided by law to the items on the basis of which such taxes were determined but such reduction being decreased by the amount of any credits under section 780 properly allocable to such reduction;

(4) the tax or taxes and the amount thereof the time for payment of which is to be extended; and

(5) such other information for the purpose of carrying out the provisions of this section as may be required by such regulations.

The collector shall, upon request, furnish a receipt for any statement filed, which shall set forth the date of such filing.

(c) *Amount to Which Extension Relates and Installment Payments.*—The amount the time for payment of which may be extended under subsection (a) with respect to

any tax shall not exceed the amount of such tax shown on the return, increased by any amount assessed as a deficiency (or as interest or additions to the tax) prior to the date of filing the statement and decreased by any amount paid or required to be paid prior to the date of such filing; and the total amount of the taxes the time for payment of which may be extended shall not exceed the amount stated under clause (3) of subsection (b). For the purposes of this subsection, an amount shall not be considered as required to be paid unless shown on the return or assessed as a deficiency (or as interest or addition to the tax), and an amount assessed as a deficiency (or as interest or additions to the tax) shall be considered to be required to be paid prior to the date of filing of the statement if the tenth day after notice and demand for its payment occurs prior to such date. If an extension of time under this section relates to only a part of a tax, the time for payment of the remainder shall be considered to be the dates on which payments would have been required if such remainder had been the tax and the taxpayer had elected to pay the tax in four equal installments as provided in section 56 (b).

(d) *Period of Extension.*—The extension of time for payment provided in this section shall expire—

(1) on the last day of the month in which falls the last date prescribed by law

(including any extension of time granted the taxpayer) for the filing of the return for the taxable year of the expected net operating loss or unused excess profits credit, or

(2) if an application for tentative carry-back adjustment provided in section 3780 with respect to such loss or unused credit is filed before the expiration of the period prescribed in clause (1), on the date on which notice is mailed by registered mail by the Commissioner to the taxpayer that such application is allowed or disallowed in whole or in part.

(e) *Revised Statements.* — Each statement filed under subsection (a) with respect to any taxable year shall be in lieu of the last statement previously filed with respect to such year. If the amount the time for payment of which is extended under a statement filed is less than the amount under the last statement previously filed the extension of time shall be terminated as to the difference between the two amounts.

(f) *Termination by Commissioner.*—The Commissioner is not required to make any examination of the statement, but he may make such examination thereof as he deems necessary and practicable. The Commissioner shall terminate the extension as to any part of the amount to which it relates which he deems should be terminated because, upon such examination, he believes that, as of the time such examination is made, all or

any part of the statement clearly is in a material respect erroneous or unreasonable.

(g) *Payments on Termination.*—If an extension of time is terminated under subsection (e) or (f) with respect to any amount, then—

(1) no further extension of time shall be made under this section with respect to such amount, and

(2) the time for payment of such amount shall be considered to be the dates on which payments would have been required if there had been no extension with respect to such amount and the taxpayer had elected to pay the tax in four equal installments as provided in section 56 (b).

(h) *Jeopardy.*—If the Commissioner believes that collection of the amount to which an extension under this section relates is in jeopardy, he shall immediately terminate such extension and notice and demand shall be made by the collector for payment of such amount.

(i) *Interest.*—In the case of an amount the time for payment of which has been extended, there shall be collected as part of such amount interest from the dates on which payments would have been required if there had been no extension and the taxpayer had elected to pay the tax in four equal instalments as provided in section 56 (b)—

(1) upon so much of such amount as is satisfied under section 3780 (b) by apply-

ing or crediting thereto, within the period of extension, a decrease in tax determined in connection with an application under section 3780 (a), interest at the rate of 3 per centum per annum to the date of such satisfaction, except that on so much of such satisfied amount as is not in excess of the amount of the deficiencies assessed under section 3780 (b) and which is not so satisfied, the rate shall be 6 per centum per annum; and

(2) upon the remainder of the amount the time for payment of which has been extended, interest at the rate of 6 per centum per annum to the date such amount is paid.

If the Commissioner determines that during the period of extension credit or refund of an overpayment has been allowed or made, or a deficiency assessed, affecting the amount to which the extension relates and that the taxpayer could not have taken such overpayment or deficiency into account in the statement or a revised statement, appropriate adjustment shall be made in the interest.

(26 U. S. C. 1946 ed., Sec. 3779.)

SEC. 3780 [As added by Section 4 (a) of the Tax Adjustment Act of 1945, *supra*]. TENTATIVE CARRY-BACK ADJUSTMENTS.

(a) *Application for Adjustment.*—A taxpayer may file an application for a tentative carry-back adjustment of the taxes for prior taxable years affected by a net operating loss carry-back, provided in section 122 (b), or an unused excess profits credit carry-back, provided in section 710 (c)(3), from any taxable year ending on or after September 30, 1945. The application shall be verified in the manner prescribed by section 51 or section 52 in the case of a return of such taxpayer, and shall be filed, on or after the date of filing of the return for the taxable year of the net operating loss or unused excess profits credit from which the carry-back results and within a period of twelve months from the end of such taxable year, in the manner and form required by regulations prescribed by the Commissioner with the approval of the Secretary. The application shall set forth, in such detail and with such supporting data and explanation as such regulations shall require—

(1) the amount of the net operating loss or unused excess profits credit;

(2) the amount of the tax previously determined for each prior taxable year affected by such carry-back; the tax previously determined being ascertained in accordance with the method prescribed in section 3801 (d);

(3) the amount of increase or decrease in each such tax, attributable to such carry-back; such increase or decrease being determined by applying the carry-back in the manner provided by law to the items on the basis of which such taxes were determined. If an application under section 124 (j) for tentative adjustment of tax with respect to amortization has been previously filed but such adjustment has not been previously determined, then for the purposes of this section the assessments, applications, credits, and refunds provided for in section 124 (k) shall be considered as having previously been made upon the basis of such application under section 124 (j);

(4) the amount by which the aggregate of such decreases exceeds the aggregate of such increases;

(5) the unpaid amount of each such tax, not including any amount required to be shown under paragraph (6);

(6) the amount, with respect to each tax for the taxable year immediately preceding the taxable year of such loss or unused credit, as to which an extension of time for payment under section 3779 is in effect; and

(7) such other information for the purposes of carrying out the provisions of this section as may be required by such regulations.

An application under this subsection shall not constitute a claim for credit or refund.

(b) *Allowance of Adjustments.*—Within a period of ninety days from the date on which an application for a tentative carry-back adjustment is filed under subsection (a), or from the last day of the month in which falls the last date prescribed by law (including any extension of time granted the taxpayer) for filing the return for the taxable year of the net operating loss or unused excess profits credit from which such carry-back results, whichever is the later, the Commissioner shall make, to the extent he deems practicable in such period, a limited examination of the application, to discover omissions and errors of computation therein, and shall determine the amount of the increase or decrease in each tax attributable to such carry-back upon the basis of the application and the examination, except that the Commissioner may disallow, without further action, any application which he finds contains errors of computation which he deems cannot be corrected by him within such ninety-day period or material omissions. Each such increase shall be deemed determined as a deficiency and shall be assessed, without regard to the restrictions on assessment in section 272. Each such decrease shall be applied against any unpaid amount of the tax decreased (including any amount of such tax as to which an extension of time under section 3779 is in effect) and any remainder shall be credited—

(1) against the deficiencies (and additions to the tax) assessed under this subsection,

(2) against any unsatisfied amount of any tax for the taxable year immediately preceding the taxable year of the net operating loss or unused excess profits credit the time for payment of which tax is extended under section 3779, and

any remainder shall, within such ninety-day period, be either credited against any income, war profits, or excess profits tax or instalment thereof then due from the taxpayer, or refunded to the taxpayer. The application, credit or refund of a decrease determined under this subsection shall be deemed a credit or refund of an overpayment within the meaning of sections 781 (b) and 3807 (b) (1).

(c) *Assessment of Erroneous Allowances.*—If the Commissioner determines that the amount applied, credited or refunded under subsection (b) is in excess of the overassessment attributable to the carry-back with respect to which such amount was applied, credited or refunded, he may assess the amount of the excess as a deficiency as if it were due to a mathematical error appearing on the face of the return, as provided in section 272 (f). Upon making such assessment, the Commissioner shall schedule as an overassessment the decrease in any other tax resulting from the adjustments reflected in the computation of the deficiency.

(26 U.S.C. 1946 ed., Sec. 3780.)

☆ U. S. GOVERNMENT PRINTING OFFICE: 1949 65617° 218